BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MICKEY IMEL	)	
Claimant	)	
VS.	)	
	)	Docket No. 175,667
BOB HOSS DODGE, INC.	)	
Respondent	)	
AND	)	
	)	
CHRYSLER INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appeals the February 26, 2007 Post-Award Medical Decision of Administrative Law Judge Robert H. Foerschler. Claimant appeared by his attorney, John M. Duma of Kansas City, Kansas. Respondent and its insurance company appeared by their attorney, Gregory D. Worth of Roeland Park, Kansas.

Claimant sought further medical treatment for a low back injury suffered while working for respondent on June 9, 1992. A settlement on February 20, 1996, resulted in a 22 percent running award, with claimant's right to seek medical treatment being left open for future determination upon application and approval. The Application For Post Award Medical filed October 12, 2005, was denied after the Administrative Law Judge (ALJ) determined claimant's need for treatment was only "remotely related"[1] to the original injury in 1992. The ALJ's decision, although not clear, seemed to determine that claimant's ongoing problems were more likely the result of the work claimant had been doing at more recent jobs, after claimant terminated his employment with respondent.

The Board has considered the record utilized by the ALJ.

[1] Post-Award Medical Decision (February 26, 2007) at 7.

ISSUES

1. Did the ALJ err in denying claimant's request for post-award medical treatment? The ALJ determined the work claimant had been doing since the original operation accelerated claimant's need for treatment for his low back pain.

2. Did the ALJ err in refusing to grant claimant's request for additional temporary total disability compensation?

3. Did the ALJ err in failing to determine claimant's request for attorney fees, or did the ALJ simply reserve that issue for a later determination? Claimant requests an immediate determination of his request for post-award attorney fees. Respondent contends that since claimant has intimated he intends to pursue review and modification of claimant's Award, an award of attorney fees at this time would be premature.

4. Should the Board determine the issue of post-award attorney fees?

FINDINGS OF FACT

Claimant worked for respondent as an auto body repair person, when, on June 9, 1992, he suffered an injury to his low back resulting in back surgery. The surgery, consisting of a fusion at L5-S1, was successful, resulting in most of claimant's pain being eliminated. After the surgery, claimant returned to his regular employment with respondent until 1994, when, due to a shortage of work, he left respondent's employment for another job.

Claimant obtained employment first at Overland Park Jeep Eagle, then at Chuck Anderson Ford and ultimately at Car Craft Body Shop. Claimant limited his work to body and paint work. He carefully followed the 30- to 40-pound lifting restrictions of Roger Jackson, M.D., requesting help when lifting anything over 40 pounds. Beginning in 2002, claimant began noticing an increase in back pain at work. Bending seemed to cause him the most trouble. Claimant described two to three occasions when, while bending over working, he developed sharp pains in his back. These events required that claimant stop working for 5 to 10 minutes each time.

Claimant sought treatment with Chris E. Wilson, M.D., on December 13, 2002. However, for reasons not explained in this record, Dr. Wilson suddenly left the practice of medicine. Claimant then sought treatment with David K. Ebelke, M.D., on February 20,

2003. Dr. Ebelke performed surgery on claimant, removing hardware that had been placed in claimant's back by Dr. Jackson. The surgery provided claimant with no pain relief. Claimant returned to work with Car Craft Body Shop, performing his regular duties until May 23, 2005, at which time claimant quit due to a significant increase in back pain.

Claimant was first examined by board certified orthopedic surgeon Jeffrey T. MacMillan, M.D., on February 27, 2006. Dr. MacMillan diagnosed claimant with wide decompression and lateral mass fusion at L5-S1, which he described as incomplete. He stated, based on current x-rays, that claimant's fusion had failed on one side, although he admitted that it was hard to judge whether the fusion was incomplete as he did not have Dr. Ebelke's medical records from the 2003 surgery. Dr. MacMillan read an MRI from December 20, 2005, as displaying degenerative disk disease at L5-S1 with subtle degeneration at L3-4 and L4-5. He found claimant to suffer from pseudoarthrosis at L5-S1.

In a letter to claimant's attorney dated June 14, 2006, Dr. MacMillan stated that he could not draw any specific conclusions as to the cause of claimant's current need for treatment. He did state that if the failed fusion was causally related to the June 1992 injury, then any need for treatment would also be related to that injury. He acknowledged that claimant's work could aggravate his symptoms, and activity accelerates the deterioration of disks. But he also said that claimant's condition would deteriorate over time regardless of activity, and the work aggravation would be as to the symptoms only and not to the underlying condition. He did acknowledge that bending forward puts an extra load on a disk. Dr. MacMillan recommended that claimant undergo a fusion from L4 to S1. Claimant's condition remained unchanged as of Dr. MacMillan's last examination of claimant on October 12, 2006.

Claimant was examined by board certified neurological surgeon Wesley E. Griffitt, M.D., on March 30, 2006. Dr. Griffitt's examination was for the purpose of providing a second opinion regarding claimant's need for surgery. Dr. Griffitt diagnosed claimant with a fusion at L5-S1, which he described as solid. Dr. Griffitt disagreed with Dr. MacMillan's diagnosis of a failed fusion. If the fusion had failed, claimant would have experienced ongoing low back pain and vague leg symptoms for years. The fact claimant was functional for seven years without significant back pain indicated a solid fusion. He did agree that a fusion would predispose a person to degeneration at the levels next to the fusion. Claimant had disk bulges at L3-4 and L4-5 and mild degeneration at L5-S1. Dr. Griffitt did not recommend surgery, instead opting for conservative treatment. He felt claimant's ongoing complaints were related to his ongoing employment, determining that claimant's work caused the new pain complaints.

Claimant was referred by respondent's attorney to board certified orthopedic surgeon John M. Ciccarelli, M.D., for an examination on October 24, 2006. Dr. Ciccarelli determined that claimant had undergone a fusion at L5-S1 with a solid result. He determined that claimant derived significant benefit from the original surgery, but little or

no benefit from the removal of the hardware in 2003. He found the possibility of a failed fusion to be highly unlikely and stated the MRI showed a solid fusion. He also disagreed with Dr. MacMillan's diagnosis of pseudoarthrosis. Dr. Ciccarelli did agree that claimant had degenerative changes at L3-4 and L4-5 with disc space narrowing at L5-S1. He agreed that the degenerative findings are activity related, but was only willing to state that claimant's subsequent work "possibly" exacerbated the condition.[2] He would not testify so within a reasonable degree of medical probability. Dr. Ciccarelli does not agree with Dr. MacMillan's recommendations for surgery.

PRINCIPLES OF LAW

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[3]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[4]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[5]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental

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[2] Ciccarelli Depo. at 12.

[3] K.S.A. 44-501 and K.S.A. 44-508(g).

[4] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[5] K.S.A. 44-501(a).

> injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[6]

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[7]

In workers' compensation litigation, when a primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from that injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.[8]

However, the Kansas Supreme Court, in *Stockman,*[9] stated:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, the claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Graber*,[10] the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."

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[6] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[7] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

[8] *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

[9] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 505 P. 2d 697 (1973); *see also Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997).

[10] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

K.S.A. 44-510k (the post-award medical benefit statute) gives the administrative law judge the authority, post award, to provide for medical care if it is necessary to cure or relieve the effects of the accidental injury which was the subject of the underlying award.[11] That statute goes on to state that no post-award benefit shall be ordered without giving all parties the opportunity to present evidence, including taking testimony on any of the disputed matters.[12]

It is clear neither K.S.A. 44-534a nor K.S.A. 44-510k limit an administrative law judge's ability to make determinations of ongoing disputed issues regarding pre- or post-award medical care.

ANALYSIS

Claimant suffered a traumatic low back injury in 1992 for which he underwent a fusion at L5-S1. The surgery was very beneficial and resulted in claimant being able to return to work with a 30- to 40-pound weight limit. Claimant successfully performed auto body and paint work for several years with little pain. Only in 2002, after several years doing this work, did claimant begin to experience increased levels of pain, which ultimately led him to another surgery and the termination of his job. Claimant acknowledged that his job, especially the bending, caused him ever increasing problems.

Dr. MacMillan attempts to relate claimant's problems back to the 1992 accident. Neither Dr. Griffitt nor Dr. Ciccarelli agree with Dr. MacMillan. Both find possible aggravation from claimant's more recent employment, with Dr. Griffitt being emphatic that claimant's ongoing work caused his recent pain complaints. Claimant's testimony that his condition continued to worsen with the work at Car Craft Body Shop more corresponds with the opinions of Dr. Griffitt and Dr. Ciccarelli than the opinion of Dr. MacMillan.

Claimant requested a determination of his right to post-award attorney fees. This issue, while presented to the ALJ, was not decided by the ALJ. The Board is limited in its review on appeals to questions presented to and decided by the ALJ.[13] As no decision has been reached on the issue of attorney fees, the matter must be remanded to the ALJ for an initial determination.

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[11] K.S.A. 44-510k(a).

[12] K.S.A. 44-510k(a).

[13] K.S.A. 44-555c(a).

CONCLUSIONS

The Board finds that claimant's current need for medical treatment stems from his more current employment with Car Craft Body Shop, rather than the injury suffered in 1992 while working for respondent. Claimant has failed to prove that his current condition and need for treatment is directly related to or is a natural consequence of his 1992 injury. Therefore, claimant's request for ongoing medical treatment at the expense of respondent and its insurance company should be denied. Claimant's request for post-award attorney fees is remanded to the ALJ for determination.

ORDER

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Post-Award Medical Decision of Administrative Law Judge Robert H. Foerschler dated February 26, 2007, should be, and is hereby, affirmed with regard to the question of claimant's entitlement to post-award attorney fees and temporary total disability, but remanded to the ALJ for a determination of claimant's entitlement to post-award attorney fees.

IT IS SO ORDERED.

Dated this ____ day of June, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John M. Duma, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge